IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.3606 OF 2005

Mayank Bharatbhai Patel : Petitioner

V/s.

Payal Mayank Patel : Respondent

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Mr.P.K. Desai with Mr.R.K.Thakkar for the petitioner.

Mr.Yogesh Vora for the respondent.

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CORAM : S.A. BOBDE, J.

June 22, 2005.

P.C.:

1. Rule, returnable forthwith.

Mr.Vora, learned counsel, appears and waives service of rule on behalf of the respondent.

Heard by consent.

2. The parties have both filed a petition for divorce by mutual consent before the Family Court. Since the respondent no.2 is presently residing in the U.S.A., she appears to have given a Power of Attorney to her brother to represent her and has not attended the Family Court counselling. There is no dispute before me that she was present at the time of filing of the petition for divorce

by mutual consent. The Family Court has vide para 4 of the impugned order rejected the prayer for divorce by mutual consent in toto because the Court has never seen the respondent (original petitioner no.2) personally nor was she interviewed by the Marriage Counsellor which, according to the petitioner, is mandatory under the provisions of the Family Court Rules, 1988. Both the learned counsel have brought to my notice rule 15 which reads as follows:-

> "**R.15. Failure to attend counselling.**-- If one of the parties fails to attend the counsellor on the date and at the time so fixed, the counsellor may fix another date and time, and inform the absent party accordingly by registered post. If the said party does not attend the counselling centre on such adjourned date, the counsellor may make a report to the Court stating that one or both the parties have failed to attend the counselling centre. On such report being made, the Court may proceed with the matter without prejudice to other powers of the Court to take action against a defaulting party."

This rule contemplates the absence of one of the parties and further that the Court may proceed to decide the matter. Indeed the Court should do so, unless there is any suspicious circumstances. No such circumstances are observed by the Family Court. This rule has been saved by rule 28 of the Family Court Rules, 1988. Absence of one of the parties cannot, therefore, be said to vitiate the entire proceedings. Apparently, the Court has not considered rule 15 quoted above.

3. The other reason given by the Court is that the brother of the respondent no.2 cannot be accepted as a Constituted Attorney. This, according to the learned counsel, was because initially the Power of Attorney was not stamped. The learned counsel stated that the Power of Attorney has now been properly stamped. Further, the learned counsel for the petitioner has relied on two judgements, one of the Division Bench of the Calcutta High Court in Subhajyati Majumdar v. Smt. Arunima Majumdar [(1992) DMC 15] and the other of this Court in S.V. Joshi v. Sou. Sulabha S. Joshi [(1986) DMC 336]. The Calcutta High Court has held that the mere non-appearance of the wife cannot be a ground for dismissing the suit and dis-allowing the application under section 13(b) of the

said Act. The Calcutta High Court has further held that the trial Court can rely on Order 3 Rules 1 and 4 of the C.P.C. and take into account the submission of a legal practitioner who is in possession of an Attorney. I see no reason to differ from the view of the Calcutta High Court.

4. This Court has in S.V. Joshi's case (supra) held that the Court's jurisdiction to grant divorce by mutual consent can be exercised even if on the date fixed for disposal, the wife remains absent. This case has also not been considered by the Family Court.

5. In the circumstances, the impugned order is set aside. The matter is remanded back to the Family Court for deciding the same, in accordance with the law referred to earlier. The rule is made absolute in the aforesaid terms.

S.A. BOBDE, J.